

**Amendments to Estates and Protected Individuals Code**  
**Adopted by Probate & Estate Planning Council**  
**on February 19, 2005**  
**and**  
**Contained in House Bill 4968**

This material is submitted on behalf of the Probate and Estate Planning Section of the State Bar of Michigan. The Probate and Estate Planning Section is a voluntary section of the State Bar. These materials represent positions of the section only and not those of the State Bar. The Section has nearly 5,000 members. Its positions are formulated by its governing Council that consists of 19 elected members. The positions reflected in these materials have been discussed by the entire Council and approved by vote of the Council in a regular meeting.

1. Amend 1104(b) to clarify the inclusion in the term "estate" the right to proceed against others for contribution to pay claims, allowances, and taxes.

Proposed Amendment: Modify 1104(b) to read:

(b) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration. *Estate also includes the rights described in sections 3805, 3922 and 7502 to collect from others amounts necessary to pay claims, allowances, and taxes.* ~~Except when used in the term "probate estate", estate includes the right of an estate described in section 7502 to proceed against a recipient of a nonprobate transfer on death and against a trust subject to a power of revocation as necessary to enable the estate to discharge claims and family allowances.~~

2. Amend 2301 to override the decision of the Court of Appeals in *Estate of Ida Sprenkle-Hill, dec.*

Proposed Amendment. Add new subsection (4) to 2301, to read:

(4) A spouse who receives an intestate share under this section also may exercise the right of election under section 2202, but the intestate share received by the spouse under this section reduces the sum available to the spouse under section 2202(2)(b).

3. Section 2519 stipulates the provisions of a Michigan Statutory Will. Among other requirements, the provisions require that witnesses to a Statutory Will not be beneficiaries under the Will. This is more restrictive than the requirements for witnessing a normal Will. Since the adoption of EPIC, a beneficiary is permitted to be a witness. The provisions for the two types of Wills should be parallel.

Proposed Amendment:

In Section 2519, delete "who will not receive assets under this will" under the heading NOTICE REGARDING WITNESSES

4. Section 2908(2) describes the effect of a disclaimer of a power of appointment. It suggests that if the power is disclaimed by one who also is a current trust beneficiary, the beneficiary loses his or her entire beneficial interest. A change is needed to provide that if only the power of appointment is disclaimed, the power simply disappears.

Proposed Amendment. Substitute the following for 2908(2):

*(2) If a donee disclaims a power of appointment or other power not held in a fiduciary capacity, the following apply:*

*(a) If the donee has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.*

*(b) If the donee has exercised the power, the disclaimer takes effect immediately after the last exercise of the power.*

*(c) The instrument creating the power is construed as if the power expired when the disclaimer became effective.*

5. Section 5202(2) describes the mechanism by which a parental nomination of a guardian for a minor becomes effective. The present provision contains a gap. It does not cover the possibility of a parent making a nomination in a will but being alive (and being incapacitated or without parental rights) when the nomination needs to be given effect.

Proposed Amendment. Modify 5202(2) to read:

*(2) Subject to the right of the minor under section 5203, if both parents are dead or have been adjudged to be legally incapacitated or the surviving parent has no parental rights or has been adjudged to be legally incapacitated, a parental appointment becomes effective when the guardian's acceptance is filed in the court in which ~~the will containing the nomination a nominating instrument~~ is probated or, ~~in the case if the nomination is contained in~~ a nontestamentary nominating instrument *or the testator who made the nomination is not deceased, when the guardian's acceptance is filed* in the court at the place where the minor resides or is present. If both parents are dead, an effective appointment by the parent who died later has priority.*

6. Section 5204 describes court appointment of a guardian for a minor. Subsection (4) gives priority to a parental nomination. It, however, refers to the parental nomination as a "testamentary guardian." This is not sufficiently broad to include a parental nomination made in a nontestamentary instrument.

Proposed Amendment. Modify 5204(4) to read:

(4) A guardian appointed under section 5202 whose appointment is not prevented or nullified under section 5203 has priority over a guardian who may be appointed by the court. The court may proceed with an appointment upon a finding that ~~the testamentary~~ *a guardian appointed in a manner described in section 5202* has failed to accept the appointment within 28 days after the notice of the guardianship proceeding.

7. Section 5217 describes the termination of a guardian's appointment: The last sentence stipulates that an appointment in an informally probated will terminates if the will later is rejected in a formal proceeding. This should be broadened to include termination of an appointment made in a will that was not probated because the testator was not dead when the appointment became effective.

Proposed Amendment. Modify 5217 to read:

A guardian's authority and responsibility terminate upon the guardian's death, resignation, or removal or upon the minor's death, adoption, marriage, or attainment of majority. However, a termination does not affect the guardian's liability for prior acts or the obligation to account for the ward's money and property. The guardian's resignation does not terminate the guardianship until it is approved by the court. A parental appointment under an *unprobated or an* informally probated will terminates if the will is later denied probate in a formal proceeding.

8. Section 5301 should be amended to make the same correction as described above pertaining to Section 5202(2).
9. Section 7401, the section that grants administrative powers to trustees, has separate provisions describing employment of legal counsel and describing employment of all other agents and advisors. The provision pertaining to attorneys was separated from the other provision in order to address separately the manner in which attorney compensation would be described. Unfortunately, the two provisions are not parallel with respect to matters other than compensation. The lack of parallelism was an unintentional oversight.

Proposed Amendment. Revise subsection (w) to read:

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, *even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation.* An attorney employed under this subdivision shall receive reasonable compensation for *his or her* ~~that~~ employment.

10. Subsections 3715(v) and (w) reflect the same lack of parallelism as 7401(2)(v) and (w). The same amendment should be made to 3715(w) as is proposed for 7401(2)(w). Likewise, 5423(z) (pertaining to powers of a conservator) should be amended.

11. A revocable trust is liable for the settlor's debts, funeral expenses and homestead, family, and exempt property allowances. Section 7502(1) states, however, that a revocable trust is not liable for homestead, family, or exempt property allowances when there is no personal representative appointed for the probate estate. In some instances, this has led to requests to appoint a personal representative solely to expose a trust to liability for those allowances. If a personal representative can be appointed even if there are no assets to administer, the trustee of a revocable trust does not have closure against possible exposure to liability for allowances.

Proposed Amendment. Provide the revocable trust is not liable for homestead, family, and exempt property allowances unless a personal representative is appointed by the end of the four-month claims period. Accordingly, modify 7502(1) to read:

Sec. 7502. (1) A trustee of a trust described in section 7501(1) shall pay to the personal representative of the settlor's estate the amount from time to time that the personal representative certifies in writing to the trustee is required to pay the administration expenses of the settlor's estate; an enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor's funeral and burial expenses; and homestead, family, and exempt property allowances. Without liability to a trust beneficiary or another party, the trustee may rely on the certificate of the personal representative. In the event there is no personal representative appointed for the settlor's estate, the trustee shall pay directly to the creditor an enforceable and timely served claim of a creditor of the settlor including a claim for the settlor's funeral and burial expenses. When ~~there is~~ no personal representative is appointed for the settlor's estate *within 4 months after the date of the publication of notice to creditors*, a trust described in section 7501(1) is not liable for payment of homestead, family, or exempt property allowances. A payment made by a trustee is subject to this section, but the payment shall be made exclusively out of property, or the proceeds of property, that is includable in the settlor's gross estate for federal estate tax purposes, other than assets proscribed in section 7501(2), (3), and (4).

12. Section 7508 describes the process by which the trustee of a revocable trust pays claims of creditors. A trustee pays claims only when there is no personal representative. If there is no personal representative, the trust is not liable for homestead, family, and exempt property allowances. Subsection 7508(1), however, refers to making provision for payment of those allowances.

Proposed Amendment: Modify 7508(1) to read:

Sec. 7508. (1) Upon the expiration of 4 months after the date of the publication of the notice to creditors, the trustee shall proceed to pay the claims allowed against the trust in the order of priority prescribed in section 7503(2)(f) to (g), after making provision for costs and expenses of trust administration, for reasonable funeral and burial expenses, ~~for the homestead, family, and exempt property allowances~~ for each claim already presented that is not yet allowed or whose allowance is appealed, and for each unbarred claim that

may yet be presented. A claimant whose claim is allowed, but not paid as provided in this section, may petition the court to secure an order directing the trustee to pay the claim to the extent that money of the trust is available for the payment.

13. Section 3919 has an incorrect cross reference in subsection (1)(c). Presently, it cross references section 3951. The correct reference should be section 3952.
14. Section 3804(1)(a) permits a claimant to present a claim either to the personal representative or proposed personal representative. The inclusion of proposed personal representative is not in the Uniform Probate Code. Its inclusion creates inconsistency with other claims provisions such as the duty to publish, the allowance or disallowance of claims, and payment of claims. Only the personal representative may participate in actions relating to these portions of the claims procedure. The proposal is to delete proposed personal representative.

#### Proposed Amendment

Revise 3804(1)(a) by deleting reference to the proposed personal representative:

Section 3804. (1) A claimant must present a claim against a decedent's estate in either of the following ways:

(a) By delivering or mailing a written statement to the personal representative ~~or proposed personal representative~~ indicating the claim's basis, the claimant's name and address, and the amount claimed, or by filing with the court a written statement of the claim in the form prescribed by supreme court rule and delivering or mailing a copy of the statement to the personal representative. ~~or proposed personal representative.~~ The claim shall be considered presented on receipt of the claim statement by the personal representative or the filing of the claim statement with the court, whichever occurs first. If a claim is not yet due, the statement shall state the date when it will become due. If the claim is contingent or unliquidated, the statement shall state the nature of the uncertainty. If the claim is secured, the statement shall describe the security. Failure to describe correctly the security, the nature of any uncertainty, or the due date of a claim not yet due does not invalidate the claim's presentation.

